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Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1988

No. _____

Arlene S. Kaganove,
Petitioner,

-vs-

Environmental Protection Agency; Lee Thomas, Administrator; Valdus V. Adamkus, Regional Administrator,
Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

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Question Presented for Review

Whether the Court of Appeals improperly extended this Court's opinion in Department of Air Force v. Rose to hold that an employee rating plan which concerned a "matter of genuine public interest" and which, if disclosed, would not "risk circumvention of agency regulation" was nonetheless exempt from disclosure under the Freedom of Information Act solely because disclosure would frustrate the document's own objective.

Table of Contents

Question Presented for Review. i

Table of Contents. ii

Table of Authorities iii

Introduction 1

Opinions Rendered Below. 2

Statement of Jurisdiction. 3

Statutory Provisions Involved. 4

Statement of the Case. 7

Reasons for Granting the Petition. . 13

Conclusion 19

Appendix A:

Opinion of the Court of Appeals for the Seventh Circuit 20

Appendix B:

Opinion of the United States District Court for the Northern District of Illinois 51

Table of Authorities

Cases

Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (en banc). 10, 13

Department of the Air Force v. Rose, 425 U.S. 352 (1976) .9, 11, 13, 16, 17

National Treasury Employees Union v. United States Customs Service, 802 F.2d 525 (D.C. Cir. 1986) . 10, 14

Statutes

5 U.S.C. § 552(b)(2) 4, 7, 13

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Introduction

To: The Chief Justice and the Associate Justices of the Supreme Court of the United States:

May It Please The Court:

Arlene S. Kaganove, petitioner, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Opinions Rendered Below

The opinion of the United States Court of Appeals for the Seventh Circuit was rendered on September 1, 1988, and is reported at 856 F.2d 884. The opinion of the United States District Court for the Northern District of Illinois was rendered on June 16, 1987, and is reported at 664 F.Supp. 352.

Statement of Jurisdiction

(i) This petition is filed within ninety (90) days of the September 1, 1988 decision of the United States Court of Appeals for the Seventh Circuit.

(ii) There was no petition for rehearing filed in the Court of Appeals or application for an extension of time to file this petition in this court.

(iii) Jurisdiction is conferred by Title 28 U.S.C. § 1254(a).

Statutory Provisions Involved

The Freedom of Information Act. 5 U.S.C. § 552, provides:

> (a) Each agency shall make available to the public information as follows:
>
> * * * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall made the records promptly available to any person.
>
> * * * * * * *

(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this

section, and the burden is on the agency to sustain its actions.

* * * * * * *

(b) This section does not apply to matters that are --

* * * * * * *

(2) related solely to the internal personnel rules and practices of an agency[.]

Statement of the Case

Petitioner Arlene S. Kaganove filed suit in the United States District Court under the Freedom of Information Act, 5 U.S.C. § 552. She had previously submitted a Freedom of Information Act (FOIA) request to the Environmental Protection Agency (EPA) for a copy of the Merit Promotion Rating Plan used for filling the vacancy of a Supervisory Environmental Specialist. The Regional Administrator of the EPA had denied her request and the EPA failed to file a timely response to her appeal. The District Court rejected the EPA's argument that the rating plan was exempt under Exemption 2 of the FOIA. The Court of Appeals reversed, and petitioner has filed a timely petition with this Court

to review the decision of the Court of Appeals.

As described by the District Court, the rating plan requested by petitioner is a two-page form containing (1) the job vacancy announcement number, (2) the job title, (3) four rating factors (descriptions of the knowledge, skills and abilities required for satisfactory job performance), (4) a numerical weight value for each rating factor and (5) one sentence descriptions of the levels of knowledge, skills and abilities needed to achieve a point value of 1 to 4 with a 4 awarded for the highest level of experience.

The rating plan is used by the EPA to rate applicants for job vacancies and is specifically drafted to rate the

knowledge, skills, and abilities identified in the vacancy announcement. When petitioner made the request for the rating plan drafted for the position of Supervisory Environmental Specialist, that position had already been filled.

The District Court relied on Department of Air Force v. Rose, 425 U.S. 352 (1976), and found that the rating plan related to a matter of "genuine public interest." This finding was based on statements made by the administrator of the EPA that the EPA's specific employment criteria for supervisory positions directly related to how the agency carried out its public responsibilities. The Court of Appeals expressed some doubt about the District Court's finding that the

matter was of public interest but found it unnecessary to decide the issue.

The District Court further applied the additional test adopted in Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) to see if disclosure would significantly risk circumvention of agency regulations or statutes. The Court found that it would not because the EPA could identify no statute or regulation threatened by disclosure.

The District Court also considered the new exemption enunciated by the District of Columbia Court of Appeals in National Treasury Employees Union v. United States Customs Service, 802 F.2d 525 (D.C. Cir. 1986) (NTEU), that even if the agency could not show a risk of

circumvention of its regulations or statutes, disclosure need not be made of any document that would be rendered "obsolete for the purpose for which [it was] designed." The District Court questioned whether this new exemption was consistent with this Court's opinion in Department of the Air Force v. Rose, but held that, even if the NTEU exemption were applied here, disclosure would not render the document obsolete because the rating plan required levels of experience which were not flexible and could not be changed even if one knew what was required.

The Court of Appeals specifically held that the NTEU test was consistent with the FOIA and disagreed with the District Court's holding that the

rating plan was distinguishable from the plans requested in NTEU.

Reasons for Granting the Petition

The decision of the Court of Appeals for the Seventh Circuit is inconsistent with the only decision of this Court, Department of Air Force v. Rose, 425 U.S. 352 (1976), interpreting Exemption 2 of the FOIA, which exempts from disclosure "matters that are related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2) This Court held in Rose that Exemption 2 did not apply to matters of "genuine public interest." This Court further indicated that documents might be exempt if release would "risk circumvention of agency regulation."

In Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc), the

District of Columbia Court of Appeals reinterpreted Rose and adopted a two-part test to determine the applicability of Exemption 2: (1) whether the document meets a test of "predominant internality" and (2) whether disclosure "significantly risks circumvention of agency regulations or statutes."

The District of Columbia Court of Appeals further extended Exemption 2 in National Treasury Employees Union v. U.S. Customs Service, (NTEU) 802 F.2d 525 (D.C. Cir. 1986), by holding that a document is exempt if release would render it "obsolete for the purpose for which [it was] designed." The Seventh Circuit adopted the new exemption propounded in NTEU in this case.

NTEU is inconsistent with Rose and

with the policy of the FOIA favoring "full agency disclosure unless information is exempted under clearly delineated statutory language." 425 U.S. at 360-61. NTEU allows an agency to generate documents that are of genuine and significant public interest but to withhold them solely on grounds intrinsic to the documents themselves, even when there is no showing that disclosure will affect the agency's regulatory mission.

The Court of Appeals for the Seventh Circuit disregarded the very careful analysis given to the rating plan by the District Court and broadly held that the rating plan was a "legitimate internal personnel document" and that "disclosure of the Rating Plan would frustrate the

document's objective." 856 F.2d at 889. The Court of Appeals opinion is devoid of analysis or facts to support these conclusions.

This Court concluded in Rose that the Senate Report[1] concerning Exemption 2 more accurately reflected the Congressional purpose than did the House Report.[2] 425 U.S. at 363. The

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[1] The Supreme Court relied upon the following provision in the Senate Report: "Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of those may be rules as to personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like." S.Rep. No.813, p. 8. 425 U.S. at 363.

[2] The House report, as relied upon by the Supreme Court, reads as follows: "2. Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would

decision of the Seventh Circuit rejects the careful line drawing evidenced in the Senate Report and exempts "a wide swath of information," which this Court feared reliance on the House Report would accomplish.

Release of the rating plan will advance the regulatory mission of the EPA. The District Court found a direct correlation between the EPA's promotion policies and the performance of its public responsibilities. 664 F.Supp. at 357. The Court noted that "the EPA's problem in this case is that it wants us to shield it from its own poor planning." 664 F.Supp. at 361.

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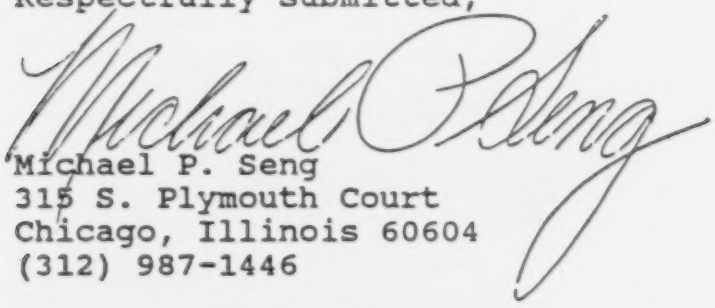
not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under the present law." H.R. Rep. No. 1497, p. 10, 425 U.S. at 363.

The niggardly approach to disclosure taken by the Seventh Circuit is inconsistent with the FOIA and directly contradicts this Court's opinion in Department of Air Force v. Rose. It is unfortunately necessary that this Court again remind the lower federal courts that the Congressional policy behind the FOIA mandates full disclosure except for the narrow circumstances enunciated in the statute and that the courts may not create new exceptions just because they think it is good policy to do so.

Conclusion

Wherefore, petitioner Arlene S. Kaganove respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,



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Arlene S. KAGANOVE,

Plaintiff-Appellee,

v.

ENVIRONMENTAL PROTECTION

AGENCY, et al.,

Defendants-Appellants.

No. 87-2286.

United States Court of Appeals,

Seventh Circuit.

Argued March 28, 1988.

Decided Sept. 1, 1988.

Before BAUER, Chief Judge,

CUDAHY, and RIPPLE, Circuit Judges.

RIPPLE, Circuit Judge.

The Environmental Protection Agency (EPA) appeals from a judgment of the district court that ordered the EPA, pursuant to the Freedom of Information Act (FOIA), to release a document entitled "Merit Promotion Rating Plan Specifications" (Rating Plan), 664 F.Supp. 352 (N.D.Ill.1987). Arlene Kaganove, the appellee, was an unsuccessful candidate for a promotion to a position as a "Supervisory Environmental Protection Specialist" with the EPA.. The Rating Plan is a two-page document created by the EPA for its use when interviewing candidates for the position sought by Ms. Kaganove. After being denied the promotion, Ms. Kaganove sought disclosure of the Rating Plan. For the

reasons that follow, we reverse the judgment of the district court.

I

Background

A. Facts

The Rating Plan is a document used by EPA evaluators to rank job candidates according to their experience and skills. The first part of the Rating Plan consists of the rating factors. The rating factors are evaluation categories that identify the experience and skills necessary for job performance. Each rating factor is assigned a numerical weight that reflects the importance of that factor to satisfactory job performance. The second part of the Rating Plan is a measuring device to evaluate the applicant's skills within each rating

factor. This measuring device consists of four descriptions of experience levels for each rating factor. These descriptions attempt to categorize and distinguish each candidate's skills. Under the Rating Plan, each level of experience is assigned a point value from one to four, which is then multiplied by the rating factor. Applicants with the highest scores then are afforded further consideration.

After being denied the promotion to a Supervisory Environmental Protection Specialist, a GS-13 position, Ms. Kaganove sought release of the RAting Plan. The EPA refused Ms. Kaganove's request. It relied on Exemption 2 of the FOIA. 5 U.S.C. § 552(b)(2). That exemption allows an agency to refuse disclosure of

documents that "relate[] solely to the internal personnel rules and practices of an agency." Id. The EPA claims that disclosure would provide applicants with detailed knowledge of rating formulas and, consequently, they might exaggerate their credentials. Because much of the information provided by job candidates is unverifiable, or only verifiable at a great cost, the EPA submits that a device such as the Rating Plan is the only practicable means of ensuring the accuracy of the claims of employment applicants.

B. District Court Opinion

The EPA and Ms. Kaganove filed cross-motions for summary judgment. In ruling on those motions, the district court first concluded, relying on

Department of the Air Force v. Rose, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976), that the EPA did not have to disclose the Rating Plan if the Plan did not relate to a matter of "genuine and significant public interest." Id. at 369, 96 S.Ct. at 1603. Applying Rose to the facts of this case, the district court concluded that there was a genuine and significant public interest in disclosure of the Rating Plan. Kaganove v. United States Envtl. Protection Agency, 664 F.Supp. 352, 358 (N.D.Ill.1987). The court noted that the EPA is a highly decentralized agency,and that a few years ago the EPA recognized the need to develop EPA personnel with agency-wide experience. The administrator of the EPA noted that the EPA needed to hire and promote

qualified employees who had agency-wide experience. To achieve this goal, the administrator introduced a new EPA policy that emphasized a preference to promote people with diverse experiences who could bring an agency-wide perspective to EPA decisionmaking.

The court then examined a sample rating plan for a different EPA position that Ms. Kaganove had offered to the court. According to the court, this sample plan reflected a bias in favor of employees who had experience in a particular department area. This was in direct conflict with the EPA's objective of achieving agency-wide experience. Accordingly, the court concluded that "because of the complexity of the EPA's mission, the recognition by its own director of the

need for EPA management with agency-wide experience and the findings of the NAPA panel,[1] it is a matter of significant public interest whether the EPA is actively promoting those with agency-wide experience." Id. at 358 (footnote supplied). Thus, the court determined that there was a significant and genuine public interest in the document sought by Ms. Kaganove.

Having concluded that the Rating Plan did involve a matter of genuine public interest, the court proceeded to determine whether the document could nonetheless be protected under the approach announced in Crooker v. Bureau

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[1] A panel of the National Academy of Public Administration (NAPA) had suggested in a report to the EPA in 1984 that the EPA needed to broaden its hiring practices in order to obtain managers with agency-wide experience.

of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C.Cir.1981) (en banc), and National Treasury Employees Union v. United States Customs Service, 802 F.2d 525 (D.C.Cir.1986) ("NTEU"). In Crooker, the District of Columbia Circuit developed a two-pronged test to be applied in Exemption 2 cases. That test asks (1) whether the document meets a test of predominant internality, and (2) whether disclosure would significantly risk circumvention of agency regulations or statutes. 670 F.2d at 1074. The NTEU court, relying on Crooker, held that an agency is not required to disclose documents when "disclosure ... would quickly render those documents obsolete for the purpose for which they were designed." 802 F.2d at 530. NTEU involved a

document virtually identical to the one at issue here. An employee group sought, and was denied, disclosure of a rating system used by the Customs Service. The NTEU court said that disclosure of the rating system would allow potential job applicants to lie about their qualifications in order to obtain the position. Accordingly, the court held that the Customs Service did not need to disclose the rating system.

Here, the district court expressly declined to state whether it agreed with the NTEU decision. 664 F.Supp. at 361 n. 6. Rather, it distinguished NTEU by noting that, in that case, the document at issue was "a road map that enables the interviewing officials to pose questions to an applicant, to explore his background and experience,

and to evaluate his qualifications for the job sought." Id. at 361 (quoting NTEU, 802 F.2d at 526). Release "would be tantamount to giving each applicant a list of exam questions." Id. The Customs Service therefore would have to revise the questions for each interview. By contrast, opined the district court, the EPA here faced no such burden:

> [T]he EPA rating plan will not become obsolete. At most, the EPA will be forced to utilize a verification process to screen out fraudulent applications. This is because the EPA cannot change the required levels of experience needed for each job because the requirements, unlike questions about an applicant's experience, are not flexible.

Id. Thus, the court believed that NTEU was inapposite and that Exemption 2 of the FOIA did not provide the EPA with a

basis for nondisclosure.

II

Analysis

The opinion of the district court reflects a careful study of the relevant statutory provisions. However, while we ow its labors our respectful and careful attention, we are presented here with a question of law that we review de novo.

The FOIA establishes a general legislative policy in favor of the disclosure of public documents. The Act contains, however, nine express exemptions that allow nondisclosure. United States Dep't of Justice v. Julian, --- U.S. ---, 108 S.Ct. 1606, 1611, 100 L.Ed.2d 1 (1988). "Congress created these exemptions because it 'realized that legitimate governmental

and private interests could be harmed by release of certain types of information.'" Id. (quoting FBI v. Abramson, 456 U.S. 615, 621, 102 S.Ct. 2054, 2059, 72 L.Ed.2d 376 (1982)). Despite the exemptions, however, "disclosure, not secrecy, is the dominant objective of the Act." Department of the Air Force v. Rose, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 1 (1976). Because of that objective, courts must construe the FOIA's nine exemptions "'as narrowly as consistent with efficient Government operation.'" Thurner Heat Treating Corp. v. NLRB, 839 F.2d 1256, 1257 (7th Cir.1988) (quoting S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)). In interpreting these examinations, it is helpful to keep in mind that the

legislative and litigation history of the FOIA reveals a deep-seated tension between federal agencies, instinctively protective of the information in their files, and the congressional judgment that access to information ought to be the norm. In this context, the judiciary's responsibility is clear: it must give effect to congressional will.

Exemption 2 of the FOIA permits nondisclosure for documents that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Under Exemption 2, both parties to this appeal agree that the EPA need not release the Rating Plan if the Plan does not relate to a matter of "genuine and significant public interest."

Rose, 425 U.S. 352, 369, 96 S.Ct. 1592, 1603, 48 L.Ed.2d 11 (1976).[2] Whether

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[2] In Rose, editors of the New York University Law Review sought disclosure of case summaries of honor code violations at the Air Force Academy. The editors sought to write an article on military discipline. The Court began its analysis by considering the general purposes of the FOIA. The Court said that the general philosophy of the FOIA was to require full agency disclosure unless information was exempted under clearly delineated statutory language. The FOIA's nine exemptions should "not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. These exemptions are explicitly made exclusive, ...' and must be narrowly construed." 425 U.S. at 361, 96 S.Ct. at 1599 (quoting EPA v. Mink, 410 U.S. 73, 79, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973)).

The Court then proceeded to examine the precise scope of Exemption 2, the exemption for information related "solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The Court noted that the HOuse and Senate Reports on the FOIA differed with respect to the scope of Exemption 2. The Senate Report said that examples of documents which can be exempted under

Exemption 2 were "personnel's use of parking facilities oar regulations of lunch hours, statements of policy as to sick leave, and the like." S.Rep. No. 813, 89th Cong., 1st Sess. 8 (1965). The House Report, on the other hand, appeared to adopt an entirely different approach. That report said:

> Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all 'matters of internal management' such as employee relations and working conditions and routine administrative procedures which are withheld under the present law.

H.R.Rep. No. 1497, 89th Cong., 2d Sess. 5 (1966) U.S.Code Cong. & Admin.News 1966, P. 2418.

The Court concluded that virtually all courts that have considered the issue have concluded that the Senate Report more accurately reflects congressional intent. Those courts that have relied on the House Report have only done so "where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals

the Rating Plan relates to such a matter is, in our view, a close

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and guidelines used by the agency in discharging its regulatory function." 425 U.S. at 364, 96 S.Ct. at 1600. According to the Court, the legislative history indicates that this was the primary concern of the committee drafting the House Report. The Court then concluded that it need not consider whether Exemption 2 allowed nondisclosure of information that "might help outsiders to circumvent regulations or standards" because there was no such threat in the case. Id. (quoting Rose v. Department of the Air Force, 495 F.2d 261, 265 (2d Cir. 1974)). Accordingly, the Court relied on the Senate Report, and said that "Exemption 2 is not applicable to matters subject to ... a genuine and significant public interest." Id. at 269.

The Court proceeded to analyze whether case summaries of honor code violations and how they were treated were matters of genuine and significant public interest. The Court noted the unique nature of the armed forces and said that discipline and honor are critical to their effective operation. Therefore, the Court concluded that the public had a genuine and significant interest in how the Air Force Academy was dealing with violations of the Honor Code.

question. Ms. Kaganove argues that the EPA has a particularly important role within the federal government and that the EPA's personnel decisions are critical to its success. The record contains evidence that the administrator of the EPA has publicly said that the EPA needs managers with agency-wide experience. The same concern was expressed in a report submitted to the EPA in 1984 by a panel of the National Academy of Public Administration. Thus, the Rating Plan arguably relates to a matter of significant public interest because the Plan might help reveal whether the EPA's specific employment criteria, at least for the position sought by Ms. Kaganove, unduly focus on job and educational experience within a narrow

subspecialty. On the other hand, the problems of recruitment, retention,and advancement experienced by the EPA are no doubt shared by many other agencies of government who, like the EPA, should shoulder tremendous responsibility for the safety and welfare of the nation. Yet, it is not entirely free from doubt that all hiring devices for all agencies at all grades can be considered matters of "a genuine and significant public interest." Rose, 425 U.S. at 369, 96 S.Ct. at 1603.

We need not decide this close question. In Rose, the Supreme Court concluded that the primary purpose of Exemption 2 was to exempt from disclosure documents devoid of genuine and significant public interest. 425 U.S. at 364-69, 96 S.Ct. at 1600-03

(relying on S.Rep. No. 813, 89th Cong., 1st Sess. 8 (1965)). However, the Court did not foreclose the possibility that Exemption 2 might be applicable in other situations as well. Indeed, the Court specifically noted that it "need not consider in this case the applicability of Exemption 2 in such circumstances ... 'where knowledge of administrative procedures might help outsiders to circumvent regulations or standards.'" Id. at 364, 96 S.Ct. at 1601 (emphasis supplied) (quoting Rose v. Department of the Air Force, 495 F.2d 261, 265 (2d Cir.1974)). In Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C.Cir.1981) (en banc), the District of Columbia Circuit addressed this issue left open in Rose. It concluded that Exemption 2

was applicable when a document "meets the test of 'predominant internality,' and if disclosure significantly risks circumvention of agency regulations or statutes...." Id. at 1074.[3] In Crooker, the District of Columbia Circuit relied heavily on the concurring opinion of Judge Leventhal in Jordan v. United States Dep't of Justice, 591 F.2d 753 (D.C.Cir.1978) (en banc):

> Exemption 2 is applicable where

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[3] A similar result had been reached in Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653 (9th Cir.1980), and in Caplan v. Burau of Alcohol, Tobacco & Firearms, 587 F.2d 544 (2d Cir.1978). But see Hawkes v. IRS, 467 F.2d 787 (6th Cir.1972) (holding that documents that would invite circumvention of agency regulations are not exempt under exemption (b)(2), but are exempt from disclosure under 5 U.S.C. § 552(a)(2)(C); Cox v. United States Dep't of Justice, 576 F.2d 1302 (8th Cir.1978) (same).

> the document consists of internal instructions to such government officials as investigators and bank examiners. In such a case disclosure would permit circumvention of the law, and there is no substantial, valid ex]ternal interest of the community at large in revelation. That composite presents a matter that involves solely internal personnel rules and internal practices of an agency for purposes of making Exemption 2 applicable.

Jordan, 591 F.2d at 783 (Leventhal, J., concurring). Moreover, noted the court in Crooker, the legislative history of the FOIA, when evaluated in the "context of the whole Act," 670 F.2d at 1062 (quoting Richards v. United States, 369 U.S. 1, 11, 82 S.Ct. 585, 592, 7 L.Ed.2d 492 (1962)), also evidences Congress' concern "to permit the effective operation of the government." Id. at 1065. For instance, noted the court, while

requiring that staff manuals be made available to the public for copying in section 552(a)(2)(C), Congress clearly evidenced a "deep concern that manuals setting forth guidelines for auditing and inspection procedures should not be released to the public." Id. at 1064. While acknowledging that Rose found the Senate rather than the House Report a more accurate reflection of the congressional intent on the scope of Exemption 2,[4] Rose, 425 U.S. at 863-64, 96 S.Ct. at 1600-01, the Crooker court also noted that there was no disagreement between the reports on the exemption of government investigatory or examination manuals. 670 F.2d at 1061.

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[4] See supra note 2 for discussion of the House and Senate Reports.

The Freedom of Information Reform Act of 1986, Pub.L. No. 99-570, subtit. N, 100 Stat. 3207, 3207-48 (1986), evidences that Crooker was correctly decided. The Reform Act codified Crooker, as it applies to law enforcement agencies, into Exemption 7of the FOIA. Pursuant to section 1801 of the Reform Act, Exemption 7 now provides, in pertinent part, that "guidelines for law enforcement investigations or prosecutions [need not be disclosed] if such disclosure could reasonably be expected to risk circumvention of the law...." 5 U.S.C. § 552(b)(7)(E) (emphasis supplied). The legislative history of the Reform Act expressly states that this amendment was modeled after "the 'circumvention of the law' standard

that the D.C.Circuit established in its en banc decision in Crooker v. BATF, 670 F.2d 1051 (D.C.Cir.1981) (en banc) (interpreting Exemption 2)>" S.Rep. No. 221, 98th Cong., 1st Sess. 25 (1983), reprinted in relevant part in 132 Cong. Rec. H9466 (daily ed. Oct. 8, 1986). Because Congress saw fit to codify the very language of Crooker, and because nothing in the legislative history of the Reform Act suggests the slightest disagreement with that case's holding, we believe that Crooker accurately expresses congressional intentions.

As noted above, in NTEU, the District of Columbia Circuit applied Crooker to a case very much like ours. The NTEU court held that Exemption 2 was applicable even if the agency could

not identify a particular statute or regulation threatened by disclosure. Rather, the court said that Crooker was apposite whenever a document related to predominantly internal personnel matters and if disclosure of the document would render it "obsolete for the purpose for which [it was] designed." 802 F.2d at 530. Of course, the purpose of the document must be legitimate and the document must not constitute "secret law." Id. at 531.

NTEU's construction of Exemption 2 is, in our view, consistent with the purposes of the FOIA. In Rose, the question left open by the Court was whether Exemption 2 applied when "regulations or standards" might be circumvented. 425 U.S. at 364, 96

S.Ct. at 1601 (emphasis supplied). The word "standards" suggests that the Court envisioned that internal personnel documents might be exempt under Exemption 2 even if disclosure would not necessarily risk circumvention of "law." The objective of the FOIA is to maximize dissemination of agency information without impeding "'efficient Government operation.'" Thurner Heat Treating Corp. v. NLRB, 839 F.2d 1256, 1257 (7th Cir.1988) (quoting S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)). The objectives of government agencies--which are of course embodied in public law--would be completely defeated by requiring disclosure of documents relating to the employment process that are effective only when kept

confidential.

In our view, there is little doubt that the Rating Plan is a legitimate internal personnel document and that disclosure of the Rating Plan would frustrate the document's objective. The Rating Plan is the sort of document that the EPA, and any other employer, reasonably would expect to be internal. Release of the Rating Plan would render it ineffectual because some job candidates, once informed in detail of the experiences that the EPA considered most valuable for a particular job, might amend the description of their prior employment. As the NTEU court, referring to documents highly similar to the EPA's Rating Plan:

> The crediting plans are designed to measure actual experience and proven ability; it would seem to follow, in theory,

> that advance knowledge of their content should not affect the rating of the candidates. But the theoretical assumption is valid only if all applicants can be depended upon to be meticulously correct in describing their past experience and their qualified or quantifiable abilities. The uncontradicted affidavits of agency officials lead to the conclusion, however, that advance knowledge of the plans by applicants would allow and induce at least some of them to embellish--or perhaps even fabricate--their backgrounds to suit the appropriate crediting plan. MOreover, the indications are that the [United States Customs Service] does not possess the human and financial resources needed to identify fabrications, to verify their falsity,and to pursue the offending applicants with appropriate legal action. Indeed, it appears that a great many of the elements in a crediting plan are capable of embellishment by an applicant in a manner that is not strictly fraudulent, or that cannot be proven to be fraudulent.

NTEU, 802 F.2d at 529 (footnotes omitted).

We can see no significant

difference between NTEU and our case. The EPA's Rating Plan is designed to measure an applicant's "actual experience and proven ability." Id. Uncontradicted affidavits offered by EPA officials suggest that advance knowledge of the Rating Plan would allow candidates to embellish their job and educational history in unverifiable ways so that they would receive a higher score on the Rating Plan numerical system. The district court suggested that the EPA could verify the information provided by job candidates. This objection ignores the EPA's submission that the practicalities of government administration and finance make such verification extraordinarily difficult if not impossible.

Accordingly, the judgment of the

district court is reversed.

REVERSED.

Arlene S. KAGANOVE,

Plaintiff-Appellee,

v.

ENVIRONMENTAL PROTECTION

PROTECTION AGENCY;

Lee Thomas, Administrator

Valdas V. Adamkus,

Regional Administrator, Defendants.

No. 86 C 5795

United States District Court,

N.D. Illinois, E.D.

June 16, 1987

MEMORANDUM OPINION

AND ORDER

ASPEN, District Judge:

Plaintiff Arlene S. Kaganove filed this complaint for injunctive relief under the Freedom of Information Act ("FOIA"), 5 U.S.C.A. § 552 (West Supp.1987). Kaganove seeks release of information from the United States Environmental Protection Agency ("EPA"). Currently before the Court are the parties' cross-motions for summary judgment. For the reasons noted below, we deny defendant EPA's motion for summary judgment and grant plaintiff Kaganove's motion for summary judgment.

I.

In April of 1986, Kaganove

submitted a written FOIA request for a copy of the Merit Promotion Rating Plan used for Vacancy Announcement Number 85-47, Supervisory Environmental Protection Specialist, GM-028-13 ("Rating Plan"). The requested record is a two-page form containing (1) the job vacancy announcement number (2) the job title, (3) four rating factors (description of the knowledge, skills and abilities required for satisfactory job performance), (4) a numerical weight value for each rating factor and (5) one sentence descriptions of the levels of knowledge, skills and abilities needed to achieve a point value of 1 to 4 with a 4 awarded for the highest level of experience.

On April 16, 1986, the EPA essentially denied Kaganove's request

on the ground that the information was exempt under 5 U.S.C. § 552a(k)(6), the Privacy Act. This section allows the head of an agency to promulgate rules to exempt records on testimony or examinations "used solely to determine individual qualifications for appointment or promotion in the federal service, the disclosure of which would compromise the objectivity or fairness of the testing or examination process...." 5 U.S.C. § 552a(k)(6). The EPA claims that it only partially denied Kaganove's request by releasing a redacted rating plan that revealed only information already public. The various numerical weight values for each rating factor and the one sentence descriptions for point value levels were redacted. Because the EPA failed

to meet the time limits on Kaganove's appeal, she is deemed to have exhausted her administrative remedies under 5 U.S.C. § 552(a)(6)(C) and is entitled to bring the present action for relief.

The EPA attempts to characterize Kaganove's request as a purely personal request to seek information used to deny her a promotion. Kaganove contends that, although it is true that she did apply for the position the rating plan applied to, her request for this information is to demonstrate policy decisions made by EPA personnel as reflected in the promotion selection process for EPA personnel. We do not think plaintiff's personal reasons for requesting information under the FOIA is relevant to our analysis since, as discussed below, we find that the

requested information concerns a matter of significant public interest.

Rating plans similar to the particular one at issue in this case are used to fill internal vacancies in the EPA. When a vacancy is to be filled through merit promotion procedures, a merit promotion "Vacancy Announcement" is published by posting it in public areas within the EPA, Region V, and by other means of publication. The announcement identifies the announcement number, position title, grade and related information. In addition, the vacancy announcement identifies the knowledge, skills and abilities determined by the EPA personnel as needed for satisfactory performance of the job. The knowledge, skills and abilities are

set forth in the rating plan as he "rating factors." The relative value of each of the various "rating factors" is measured by a factor weight. Kaganove seeks release of the factor weights for each of the rating factors for the Vacancy Announcement Number 85-47

The rating plan also breaks each of the "rating factors" into four possible skill, experience and knowledge levels. Each level is assigned a numerical point value of 1 to 4. Four points are awarded to the highest level of skill, experience and knowledge, and one point is awarded for the lowest level of skill, experience and knowledge. Each point level consists of a one-sentence description of the skill, experience and knowledge

necessary for an applicant to achieve that particular point level. Kaganove also seeks release of this information, that is, the one sentence descriptions of the point value levels.

Kaganove has attached to her cross-motion a sample rating plan for the position of Supervisory Interdisciplinary Engineer Scientist.[1] We will use this rating plan as example of the type of information that is being sought in this case. For example, for this position, the EPA identified seven different rating factors. The first rating factor is "knowledge of hazardous waste management technology" and is given a

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1. This is not the specific rating plan at issue here. The EPA, however, does not deny the validity of this rating plan as an example.

factor weight of 3. This rating factor is then broken down into four point levels:

> Four Points: Experience performing technical adequacy reviews of hazardous waste storage permit applications and either (1) experience performance geological or civil engineering reviews of land disposal permit applications or (2) chemical engineering/ chemistry reviews of incinerator permit applications.
>
> Three Points: Experience performing technical adequacy reviews of hazardous waste storage permit applications and either (1) experience performing general technical reviews of land disposal permit applications or (2) general technical reviews of incinerator permit applications.
>
> Two Points: Experience performing technical adequacy reviews of any hazardous waste management permit applications.
>
> One Point: Anything less than for 2 points.

(Plaintiff's Exhibit H). It is these one-sentence descriptions under each rating factor that Kaganove seeks for

Vacancy 85-47.

The personnel individual charged with rating an applicant's application for the vacancy evaluates the applicant's past skills, experience and knowledge and assigns an appropriate point level to the candidate for each rating factor. For example, for someone with none of the experiences required for point levels 2 through 4 but who had some knowledge of hazardous waste technology, he or she is assigned 1 point. The 1 point is then multiplied by the factor weight which represents the EPA decision as to the relative value of each factor assigned to rating factor 1. Kaganove also seeks release of these factor weights on Vacancy 85-47. In this case, the factor weight is 3. Thus,

our hypothetical applicant with a little knowledge of hazardous waste management technology would end up with a point value of 3 for rating factor 1. This process would continue for the remaining six rating factors. The scores for all the rating factors are added and then divided by the sum of the factor weight values. The result, a score of 1 to 4, is the applicant's average point score in the merit promotion process. Applicants with an average of 3 or more points are certified as highly qualified. Those with fewer than three points are considered qualified. Generally, highly qualified candidates are customarily referred to the selecting official for further consideration for the position. Qualified candidates may

not necessarily be referred for further consideration.

II.

Under Fed.R.Civ.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Thus, Rule 56(c) requires the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex

Corp. v. Catrett, ___ U.S. ___, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

When Congress enacted the Freedom of Information Act, its goal was to replace the inadequate public disclosure provisions of the Administrative Procedure Act. Congress therefore structured the FOIA to reflect "'a general philosophy of full agency disclosure unless information [was] exempted under clearly delineated statutory language.'" Department of Air Force v. Rose, 425 U.S. 352, 361-62, 96 S.Ct. 1592,1599, 48 L.Ed.2d 11 (1976). There are nine statutory exemptions to the FOIA, and these exemptions are to be narrowly construed so as to support the basic policy of the act to disclose and not to

withhold. Id. Thus, the burden to show that requested information is covered by an exemption rests squarely upon the government. With these guidelines in mind, we turn to examine the EPA's claimed exemption.

A.

Although the EPA initially denied Kaganove's request under 5 U.S.C. § 552a(k)(6) of the Privacy Act, it now abandons that ground and seeks exclusion directly under a FOIA exception, 5 U.S.C. § 552(b)(2) ("Exemption 2") which exempts from disclosure matters "related solely to the internal personnel rules and practices of an agency." Id. Unlike other exemptions "Exemption 2 is the only exemption in the FOIA having a conceptual underpinning totally

unrelated to any harm caused by disclosure per se; rather, it is aimed at avoiding the sheer administrative burden that can be imposed by the FOIA processing." R. Bouchard, Guidebook to the Freedom of Information and Privacy Acts 1985 Supplement 23 (1985). The "general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest." Department of the Air Force, 425 U.S. at 370, 96 S.Ct. at 1603.

Despite the EPA's total failure to cite or mention it, we are guided and bound by the Supreme Court's decision in Department of the Air Force v. Rose, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d

11 (1976), the only case in which the Court has had occasion to construe the policies and purposes behind Exemption 2. In Department of the Air Force, present and former law review editors sought disclosure from the Air Force of case summaries of honor and ethics hearings at the Air Force Service Academy with personal references and other identifying material deleted. The editors were researching disciplinary systems and procedures at the military service academies for a law review article. The Air Force denied the FOIA request order Exemptions 2 and 6. 5 U.S.C. § 552(b)(2), (6). In construing Exemption 2, the Supreme Court examined its legislative history. It found that the House and Senate Reports on the

bill finally enacted differed upon the scope of Exemption 2. The Senate Report stated:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like.

Department of the Air Force, 425 U.s. at 364, 96 S.Ct. at 1600 (citing S.Rep. No. 813, p. 8). The House Report, on the other hand, declared:

> 2. Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines,a nd manuals of procedure for Government investigators or examines would be exempt from disclosure, but his exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under the present law.

Id. (citing H.R.Rep. No. 1497, p. 10). In deciding that the Senate report more closely represented congressional intent, the Court recognized that the narrower Senate version supported the principal purpose of the FOIA in that it favored disclosure, and it was also the only committee report before both houses of Congress. Id. at 367, 96 S.Ct. at 1601. The Supreme Court did leave open the issue of whether Exemption 2 might permit "withholding of matters of some public interest ... where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function. Id. at 365, 96

S.Ct. at 1600, finding that this was the primary focus behind the House Report. Id. at 367, 96 S.Ct. at 1602.

B.

The first requirement for application of Exemption 2 is that the requested information "relate solely to the internal personnel rules and practices of an agency." The Supreme Court in Department of the Air Force indicated that Exemption 2 is not applicable to "matters subject to 'a genuine and significant public interest.'" 425 U.S. at 370, 96 S.Ct. at 1603. Thus, even if the requested information in this case did pertain to internal personnel rules and practices, if it is subject to a genuine and significant public interest than it does not come within the ambit of

Exemption 2.[2] The EPA contends that, because the requested information is not concerned with "regulating the behavior of the public," it is of no significance to the public. We disagree. The Supreme Court rejected the identical argument in Department of the Air Force. In that case, the District Court had concluded that, because the Honor and Ethics Codes "'by definition ... are meant to control only those people in the agency ... the operation of the Honor Code cannot possibly affect anyone outside its sphere of voluntary participation which is limited by its function and its publication to the Academy.'" Id. at 368, 96 S.Ct. at 1602. The Supreme

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2. Provided that release would not risk circumvention of agency regulations or statutes. See below.

Court rejected that position and indicated that a court must inquire whether the information, despite its ostensible internal application, may still be the subject of genuine and significant public interest. The Court concluded that the Academy's administration of discipline had a very significant impact on the public because it directly related to the ability of the military to perform its function. Therefore, before we go any further, we must determine whether the information sought to be released may be the subject of "genuine and significant public interest."

The EPA in its reply memorandum further argues that the content of the rating plans at issue here, while having some public interest, does not

raise to the level of public interest necessary to be a matter of significant public interest. EPA cites National Treasury Employees Union v. U.S. Customs Service, 802 F.2d 525 (D.C.Cir. 1986) ("NTEU") for the proposition that evaluative criteria used by personnel departments only have some impact on the public but not enough to be significant. However, NTEU involved only appointments of entry level and lower level federal employees, and the court only found that "the appointments of individual members of the lower federal bureaucracy is primarily a question of internal significances for the agencies involved." Id. at 531. In this case the information sought refers to only one position. Supervisory Environmental Protection

Specialist, a GS-13 level position. Additionally, Kaganove presents very convincing evidence, evidence not present in NTEU, that information she seeks has a significant public interest.

Because it is such a highly decentralized agency, entrusted with the execution of a myriad of statutes, not all of which interrelate, a few years ago the EPA recognized the need to develop EPA personnel with agency-wide experience. This need was recognized by the current administrator f the EPA, Lee Thomas, in his letter distributing an EPA concept paper in which he introduced his new FAME program. He indicated that one of the keys to the effectiveness and continued vitality of the EPA was to "make the

EPA the kind of place that attracts, develops, and retains quality people." (Plaintiff's Exhibit C). The FAME Program, Framework for Achieving Managerial Excellence, had as one of its key objectives the need to "[d]evelop executives, managers, and supervisors who have an Agency-wide perspective." It also introduced a new EPA policy that would emphasize a preference to promote people with diverse experiences who would bring an agency-wide perspective to EPA decision making.

The interrelationship between the agency's policies and its public responsibilities was also emphasized in a report submitted to the EPA in May 1984 by a panel of the National Academy of Public Administration ("NAPA").

That report made the following conclusions regarding EPA personnel needs:

> EPA's effectiveness in its complex mission will continue to depend on its employees. It is accordingly a matter of highest priority that talented employees continue to be attracted, motivated, and retained. They also must be developed and managed along lines supportive of the Agency's programs, which increasingly involve the coordination and oversight of complex intergovernmental regulatory arrangements in which state and local officials make the site-specific decisions. They must be led, at the senior career level, by managers sensitive both to the professionalism and objectivity the public demands of the EPA and the legitimate policy views of elected political leadership. And EPA must have personnel and budget processes consistent with these needs and with the need to translate policy into specific goals and resources that give direction to its talented staff. <u>In our judgment, EPA must undertake major efforts to improve the management of its People</u>. (Plaintiff's Exhibit D at 7.)

One of the panel's key

recommendations was for the EPA to undertake a comprehensive and coordinated career development and executive development effort on behalf of its employees, because it found that "[m]any EPA employees are currently prisoners of their career specialties and their geographic location. A fundamental objective of the Agency's career development and training should be the removal of barriers to functional and geographic mobility. [It also found] that the EPA does not encourage aggressively enough the Agency-wide experience that is needed in top career managers." Id. at 3. The EPA does not dispute the validity of this evidence, only the legal conclusions to be drawn thereinfrom.

An examination of the sample

rating plan Kaganove has submitted to this Court demonstrates Kaganove's point exactly, the plan indeed is biased in favor of those with experience in the department area against those without such experience.[3] The rating plan has seven rating factors, as detailed above. An examination of the first two rating factors reveals this built-in bias in favor of career specialists. The first factor is labeled, "knowledge of hazardous waste management technology." The non-disclosed point level

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[3]. The rating plan for "Supervisory, Interdisciplinary Engineer/Scientist 86-15" appears to be for a position in the hazardous waste area, although it is not that clear. We, however, will proceed on that assumption.

descriptions which are at issue[4] for 4, 3 and 2 points require some type of hazardous waste experience. This seems reasonable enough for a hazardous waste position, and the one sentence descriptions require only that an applicant have experience in the area, not that they actually had a hazardous waste position. Although, if an applicant had such a position, he would most likely have the proper experience. But the content of this particular non-

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[4]. This rating plan is not the rating plan at issue in this case, but because its authenticity is an example of rating plans used by EPA Region V is not contested, we take it as evidence of all such plans. The EPA could have submitted the plan at issue to the Court for in camera inspection, but chose not to do so. Nor does the EPA contend that his rating plan is unique. Rather, it submitted an affidavit from a personnel specialist which indicated that these rating plans frequently use the exact same criteria for different job openings.

disclosed point level description reveals nothing that is not expected, after all, the rating factor is titled "knowledge of hazardous waste management technology." What is not expected, and what does clearly reflect a bias in favor of "career specialists" is the non-disclosed point level descriptions that appear under the second rating factor, "knowledge of pollution control legislation, regulations and standards." The label of this rating factor does not seem to relate to any specific program, and, ideally, it would seem to be the perfect opportunity for those applicants from outside the hazardous waste area to score points for general experience gained in other positions. However, the point value description

for 4 points, the highest number of points, states that it is only to be given if the applicant has "[e]xperience in the federal, or state, hazardous waste management program, in a position where extensive knowledge of legislation, regulations and standards was required." (Plaintiff's Exhibit H). The point level description for 3 points is exactly the same as that for 4 points except that it does not require a former position in a hazardous waste management program. Thus, those applicants who are already in, or were previously in, a hazardous waste position can get the highest number of points. This clearly demonstrates Kaganove's position. We agree with Kaganove that in this case, because of the complexity of the EPA's

mission, the recognition by its own director of the need for EPA managers with agency-wide experience and the findings of the NAPA panel, it is a matter of significant public interest whether the EPA is actively promoting those with agency-wide experience.

C.

Because Kaganove has demonstrated that the information she seeks is not solely related to the internal personnel practices of the EPA and is a subject of significant public interest, the EPA in order to withhold this information must show that this information fits within the category of information the Supreme Court referred to as possibly withholdable despite its public interest, that is, information that if released might result in

circumvention of agency regulations or statues, This is the EPA's principal argument in their motion for summary judgment.

The EPA cites a line of DIstrict of Columbia Circuit Court of Appeals cases which it claims supports its position that the requested information is exempt. The key case in this line is Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C.Cir. 1981) (en banc). The D.C. Circuit developed a two-prong test to be applied to Exemption 2 claims. That test asks (1) whether the document meets a test of predominant internality and (2) whether disclosure would significantly risk circumvention of agency regulations or statutes. Id. at 1074. The Crooker test was a response

to the difficulties that had arisen in applying the language of Exemption 2 to particular cases. In Crooker itself, for example, the plaintiff had sought the release of portions of an agent's training manual from the Bureau of Alcohol, Tobacco and Firearms ("BATF"). The requested material consisted of instructions to the BATF agents on the conduct of their official duties. The Crooker court found that release of portions of the training manual would risk circumvention of agency regulations by those people who the agency is set up to regulate. Crooker, 670 F.2d 1051, 1073 (D.C.Cir.1981). It is this type of circumvention, that is, circumvention by those people who the agency regulates, that the Supreme Court referred to when it identified

the concerns demonstrated by the House Report. Accordingly, we think Crooker correctly allowed the BATF to use Exemption 2. The EPA, however, in this case first argues that the requested material is exempt under Exemption 2 because disclosure would risk circumvention of agency regulations which provide for the non-disclosure of such material. The EPA does not content that release of this information would allow the subjects of EPA environmental regulations to circumvent EPA regulation. We do not think that it is this type of agency regulation circumvention that the Supreme Court indicated may provide justification for exemption under Exemption 2. Otherwise, as the court in National Treasury Employees Union v.

U.S. Customs Service, 802 F.2d 525, 530 (D.C.Cir.1986) ("NTEU"), noted, "[i]f such a regulation were sufficient, the result would be a de facto abdication by the courts of their responsibility to review de novo agency actions withholding documents." Id. In order to suppress information, an agency would need only to pass a rule stating the information should not be released. What a court must do in this context is to determine whether the release of the requested information risks circumvention of some statute or regulation other than the one designating the materials as confidential.

The EPA next argues that either 5 U.S.C. § 2301(b)(1) or § 23002(b)(6) would be circumvented by release of

this information.[5]

The EPA claims that release of the information in this case will violate this statute because there will not be a fair and open competition for merit positions. We disagree. Although the EPA reads NTEU as holding that release of a crediting plan used by Customs to members of the lower level federal

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[5]. Section 2301(b)(1) provide:

(b) Federal personnel management should be implemented consistent with the following merit system:

> (1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

5 U.S.C.A. § 2301(b)(1) (West Supp. 1987).

bureaucracy, NTEU, 802 F.2d at 531, would violate § 2301(b)(1), we do not agree that NTEU held that at all. A careful reading of the NTEU opinion reveals that the court in NTEU specifically found that "[Customs] cannot ... rely on a specific statute or regulation ..." Id. at 530, and then proceeded to judicially legislate a new exemption into the FOIA. The new exemption was to apply whenever "disclosure would quickly render those documents obsolete for the purpose for which they were designed." Id. The language the EPA cites that it claims amounts to a holding that release of such information would violate § 2302(b)(1) refers only to the court's conclusion that a principle of the merit system as set forth in §

2301(b)(1) is being violated, it is clear by the court's plain statement that Customs could not rely on a specific statute and its creation of a new exemption that the court did not find that the violation of a principle in § 2301 amounted to a violation of that statute. Nor would we find that § 2301 (b)(1) would be violated other than in spirit. The only way a person can violate § 2301 would be to do so by violating another statute, § 2302(b)(11), which provides that no employee with authority shall "take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this

title." 5 U.S.C. § 2302(b)(11). Thus, in order to violate the merit system principles enunciated in § 2301, one must take or fail to take a personnel action that if taking or failing to take violates some other law, rule or regulation that concerns the principles. This construction of the statute is supported by the language used in § 2301. Section 2301 sets forth the principles of the federal merit system, and Congress used directory rather than mandatory language to set forth these principles. Section 2301 refers to principles that agencies "should" strive to achieve, such as the "work force should be used efficiently" § 2301(b)(5) and "[e]qual pay should be provided for work of equal value," §

2301(b0(3). All of the principles set forth in § 2301(b) use "should" instead of "shall." This is in sharp contrast to the language in § 2302 "Prohibited personnel practices," which is mandatory: "Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority" do any of the prohibited personnel practices. § 2302(b). Therefore, we find that the EPA cannot rely on a risk that 5 U.S.C. § 2301(b)(1) would be circumvented by release of the requested information to justify its withholding of that information.

The next statute the EPA argues could be violated by release of the requested information is 5 U.S.C. §

2301(b)(6). We again disagree. That section makes it a prohibited personnel practice to grant a preference to any employee or applicant for the "purpose of improving or injuring the prospects of any particular person for employment." 5 U.S.C. § 2302(b)(6). § 2302(b)(6) provides:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority -
>
> * * * * ***
>
> (6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements of any position) for the purpose of improving or injuring the prospects of any particular person for employment.

Even assuming that release of this information would assist anyone in seeking a position, it is clear that by

responding to a valid FOIA request, they would only be granting such a preference "authorized by law." If EPA personnel would attempt to manipulate the FOIA process to benefit a particular individual, then they may be violating § 2302(b0(6).

Accordingly, as discussed above, the EPA has failed to demonstrate that release of this information would risk circumvention of either (a) an agency regulation or (b) a statute.

D.

The only justification left the EPA for the denial of disclosure is the newly-created exemption in National Treasury Employees Union v. U.S. Customs, 802 F.2d 525 (D.C.Cir.1986). In NTEU, the court created an exemption to be applied when release of the

information would render the documents obsolete for the purpose for which they were designed. NTEU, 802 F.2d at 530. The EPA contends that release of the point value descriptions of the rating factors and the factor weights would compromise the utility of the ratings plan. Essentially, the EPA argues that if the information was released, applicants for the position would tailor their applications to emphasize their experience in those areas with the highest factor weights and also fabricate their previous experiences so as to fit within the highest, point value level descriptions. The EPA contends, by way of an affidavit from one of its personnel specialists, that it is impossible for the EPA to verify each and every statement an applicant

makes. Thus, the EPA contends if it is forced to release this or any other rating plan, that the rating plans would be "obsolete for the purpose for which they were designed." NTEU, 802 F.2d at 530.

In NTEU the crediting plan at issue there was described by the court as "a road map that enables the interviewing officials to pose questions to an applicant, to explore his background and experience, and to evaluate his qualifications for the job sought," id at 526, release of which would be tantamount to giving each applicant a list of exam questions. The rating plan in this case does not contain exam questions that are to be asked each applicant to test whether the applicant really has the

experience he claims to have on his application. Here, if we order the release of the information sought, the EPA rating plan will not become obsolete. At most, the EPA will be forced to utilize a verification process to screen out fraudulent applications. This is because the EPA cannot change the required levels of experience needed for each job because the requirements, unlike questions about an applicant's experience, are not flexible. In the NTEU case, Customs would have had to revise the crediting plans to include new questions for each position. That cannot be done in this case. If the information on the EPA rating plan is released, the EPA cannot rewrite new qualifications for each applicant

because the nature of the information sought is not the same as "test question." The information sought refers to the experience necessary for the position and the relative value of that experience. That information remains the same for each person whether the potential applicant knows it ahead of time or not. Therefore, the EPA's plan does not fit within the parameters of this newly-created exemption to the FOIA as found in NTEU.[6]

The EPA's problem in this case is that it wants us to shield it from its own poor planning. If the information

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6. Because we find that the EPA's rating plan does not fit within the judicially created exemption in NTEU v. Customs, 802 F.2d 525 (D.C.Cir. 1986), we need not approve or disapprove of that opinion.

is unverifiable, then it should not be used to rate applicants. This only encourages and rewards deception. The crediting plans used in the NTEU case would appear to be a much more practical avenue to achieve the same goal. By having the applicants answer questions about their experience, the EPA could identify who really did what, and who was making it up. But this case is not about the relative virtues of one personnel plan over another; it is about the scope of the Freedom of Information Act. The overriding goal of the FOIA is to release information to the public. In very limited and narrow circumstances, the information may be withheld. As we have discussed above, the EPA has failed to demonstrate that the particular

information sought to be released comes within any of the FOIA exemptions.[7] It would not serve the goals and objectives of the FOIA to allow the EPA to withhold information of significant public interest merely because it would make the EPA's personnel job more difficult.

Because we find that the EPA has not met its burden to establish the information requested under the Freedom of Information Act is covered by an exemption, we grant Kaganove's motion for summary\judgment and deny the EPA's motion for summary judgment. The EPA is directed to release the requested

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[7]. Because of our finding that the issue of promoting those with agency-wide experience is a matter of significant public interest, our holding applies only to the EPA.

information to plaintiff. It is so ordered.